



LUMMI INDIAN BUSINESS COUNCIL

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DEPARTMENT _____ EXT. _____

May 9, 2007

Mr. Andrew Maron
Alternate SEPA Official
Port of Bellingham
P.O. Box 1677
1801 Roeder Avenue
Bellingham, WA 98227-1677

**SUBJECT: Lummi Nation Comments on the April 19, 2007 New Whatcom
Redevelopment Project Environmental Impact Statement Draft Scoping
Document**

Dear Mr. Maron,

The purpose of this letter is to provide comments by the Lummi Natural Resources Department on the subject draft scoping document. The Lummi Cultural Resources Department may be submitting comments on this document under a separate cover.

Overall Comments:

1. The inclusion of the conversion of the Aerated Stabilization Basin (ASB) to a marina and other activities (i.e., redevelopment of existing industrial land and buildings, construction of bridge access, construction of overwater trails, and marine infrastructure improvements) in the "No Action" alternative is not appropriate. It is not currently known whether or not these actions will occur and they have not been evaluated for environmental impacts nor permitted. Although it is appropriate to include activities in the "No Action" alternative that would be expected to take place under future circumstances without implementation of the proposed actions, it is not known if these activities, specifically the ASB conversion to a marina, will occur. The fact that the ASB conversion is consistent with the existing zoning and the Port's condemnation action does not negate the fact that the conversion is not consistent with Condition "S" of Permit No. 071-OYB-2-004368 (the permit issued to Georgia Pacific Corporation to authorize the construction of the ASB under Section 404 of the Clean Water Act). The Lummi Nation has requested that the District Engineer require that the ASB and associated rip-rap and contaminants be completely removed and disposed of at an upland location and the ASB area restored to the eelgrass beds that existed prior to the construction of the ASB. This site was historically comprised of expansive eelgrass beds and remnants of these beds still exist along the exterior fringe of the ASB.

Because it is unknown if the ASB conversion to a marina and other activities will occur, they must be included and considered in the development and evaluation of project alternatives for the EIS. In compliance with SEPA rules, these actions, including the marina development, should be evaluated as a single action together with the proposed action items. WAC 197-11-60(3)(b) states that, "Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document." The National Environmental Policy Act (NEPA) has similar requirements (40 CFR 1502.4(a)). The development of a Master Development Plan, the ASB conversion to a marina rather than restoring fish habitat and fishing grounds, construction of trails, and marine infrastructure are actions that could occur as part of the redevelopment of the New Whatcom area and therefore should be considered as one project and evaluated in the EIS as such. Alternatives that will be in compliance with the WAC and NEPA should therefore also include the alternative uses of the ASB site. For example, no action (which is not allowable under Permit No. 071-OYB-2-004368), removal of the ASB, and conversion of the ASB to a marina are alternatives that should be evaluated. These alternatives should also consider the various approaches to the other actions such as the development of bridge access to the site.

2. Similarly, the list of identified alternatives is incomplete in that it does not include implementation of an important alternative sub-area strategy identified in the 2000 Comprehensive Strategy EIS developed by the Bellingham Bay Pilot Team (Pilot Team). Habitat Action No. 13 identified by the Pilot Team is the removal of the Aerated Stabilization Basin (ASB) from the water and establishment of intertidal and shallow subtidal habitat and marine buffers and/or eelgrass. As described in Appendix A of the 2006 draft Supplemental Environmental Impact Statement (SEIS), Habitat Action No. 13 would result in the single largest habitat gain (33 acres) of all of the actions identified by the Pilot Team. This alternative aquatic land use should be evaluated as an alternative action.
3. The EIS should be written in a manner to also address National Environmental Policy Act (NEPA) requirements. Writing the EIS in a manner that addresses both State Environmental Policy Act (SEPA) and NEPA requirements would ensure that the required federal permitting for the proposed clean up actions would be more stream-lined. This combined approach would better achieve Bellingham Bay Pilot Goal 6 (i.e., *Implement actions that are more expedient and more cost-effective, through approaches that achieve multiple objectives*). As written, the scoping document does not comply with NEPA because cumulative effects and environmental justice issues associated with the alternatives are not considered.

Similar to SEPA, federal impact assessments specifically require treatment of cumulative effects during EPA and EIS procedures: "Cumulative impacts result when the effects of an action are added to or interact with other effects in a particular place and within a particular time. It is the combination of these effects, and any resulting environmental degradation, that should be the focus of cumulative impact analysis. While impacts can be differentiated by direct, indirect, and cumulative, the concept of cumulative impacts takes into account all disturbances, since cumulative impacts result in the compounding of the effect of all actions

over time. Thus, the cumulative impacts of an action can be viewed as the total effects on a resource, ecosystem, or human community of that action and all other activities affecting that resource, no matter what entity (federal, non-federal or private) is taking the actions.” (EPA 315-R-99).

In addition, Executive Order 12898 of February 11, 1994 requires federal agencies to achieve environmental justice by addressing “disproportionately high and adverse human health and environmental effects on minority and low-income populations.” The impacts of the project, both negative and positive, on minority and low-income populations must be analyzed. Environmental Justice issues include potential impacts on the physical and natural environment as well as social, cultural, and economic effects of the project. Based on the 2000 Census, the Lummi tribal members comprise the largest low income, minority population in the area and the physical, natural, social, cultural, and economic impacts of each of the proposed alternatives on the Lummi people need to be specifically addressed.

The draft scoping document for the EIS should be revised to comply with NEPA and specifically address both cumulative effects and environmental justice issues for each alternative.

4. The characterization of affected fish and wildlife habitat in the EIS should be based on the more appropriate environmental baseline that existed along what is now the Bellingham waterfront prior to the substantial anthropogenic impacts to this environment. The Lummi Nation is a fishing tribe and has used the waters and shorelines of Bellingham Bay since time immemorial. The Lummi Nation is one of the signatories to the Point Elliot Treaty of January 22, 1855 (12 Stat. 927) which was ratified by the United States Senate on March 8, 1859, Proclaimed April 11, 1859 and which reserves certain rights for the Lummi people including but not limited to “the right of taking fish at usual and accustomed grounds and stations” and “hunting and gathering roots and berries on open and unclaimed lands.” The decision of *United States v. Washington* (384 F. Supp. 312, 377 [W.D. Wash. 1974], aff’d, 520 F.2d 676 [9th Cir. 1975], cert. Denied, 423 U.S. 1086 [1976]) and subsequent court orders, as upheld by the United States Supreme Court, provide rules of engagement of the Lummi Nation and other co-managers relating to natural resources management.

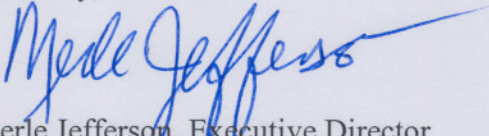
Prior to and following the arrival of Euro-Americans, the shorelines of Bellingham Bay were used as fishing villages and the tidelands and waters of Bellingham Bay were used to harvest fin- and shellfish for commercial, subsistence, and ceremonial purposes. Although the Lummi Nation still fishes the waters of Bellingham Bay, the resources have been degraded by human activities and shoreline development has precluded the use of traditional hunting, fishing, and gathering sites along the bay. As shown in Figure 1 and detailed in Figure 2, approximately 748 acres of the Bellingham Bay nearshore has been impacted (dredged, filled, or armored) including the Whatcom Waterway and the Aerated Stabilization Basin (ASB). In addition to these actions, which have physically precluded the exercise of tribal treaty rights in these areas, the Whatcom Waterway, the ASB, and surrounding areas are contaminated with a number of substances released from industrial waterfront activities

including mercury discharges from the former Georgia Pacific chlor-alkali plant. By adopting the degraded current conditions as an environmental baseline, the environmental impacts of the proposed alternatives are lessened. Addressing cumulative effects and environmental justice issues will result in a more accurate assessment of the impacts of each alternative.

5. A Clean Water Act Section 401 certification from the Lummi Nation will be required for any activities that affect Lummi Nation waters – which include Bellingham Bay.

In summary, objectively addressing both cumulative effects and environmental justice issues and adding the Bellingham Pilot Team Habitat Action No. 13 as an alternative would help complete the analysis and support the selection of an appropriate preferred alternative.

Sincerely,

A handwritten signature in blue ink, reading "Merle Jefferson", with a long horizontal flourish extending to the right.

Merle Jefferson, Executive Director
Lummi Natural Resources Department

cc Evelyn Jefferson, LIBC Chairwoman
Elden Hillaire, Lummi Natural Resources Commission Chairman
Richard Grout, Washington Department of Ecology
Michelle Walker, Corps of Engineers
Tim Douglas, Mayor of Bellingham

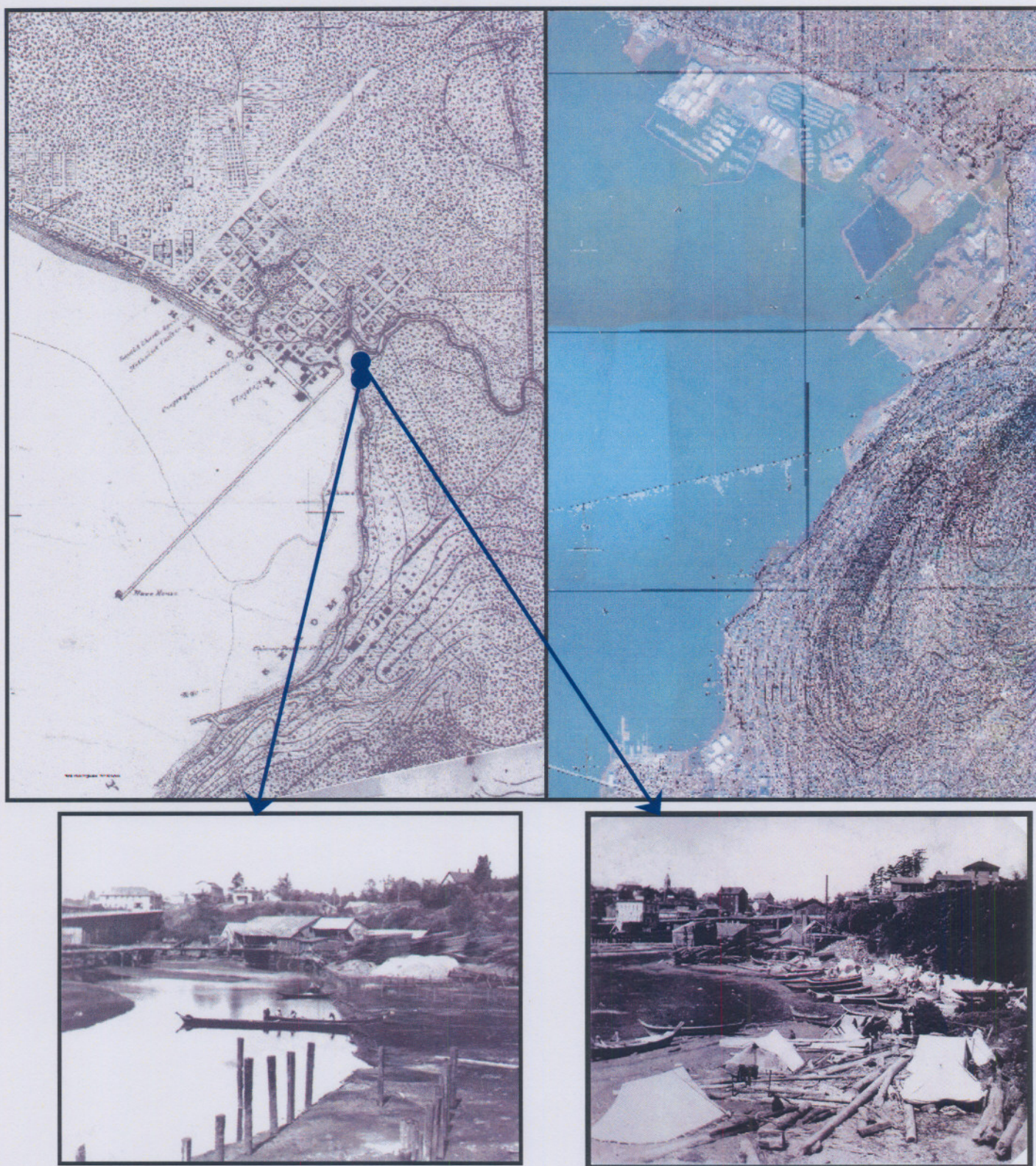


Figure 1. Bellingham Bay Nearshore Impacts

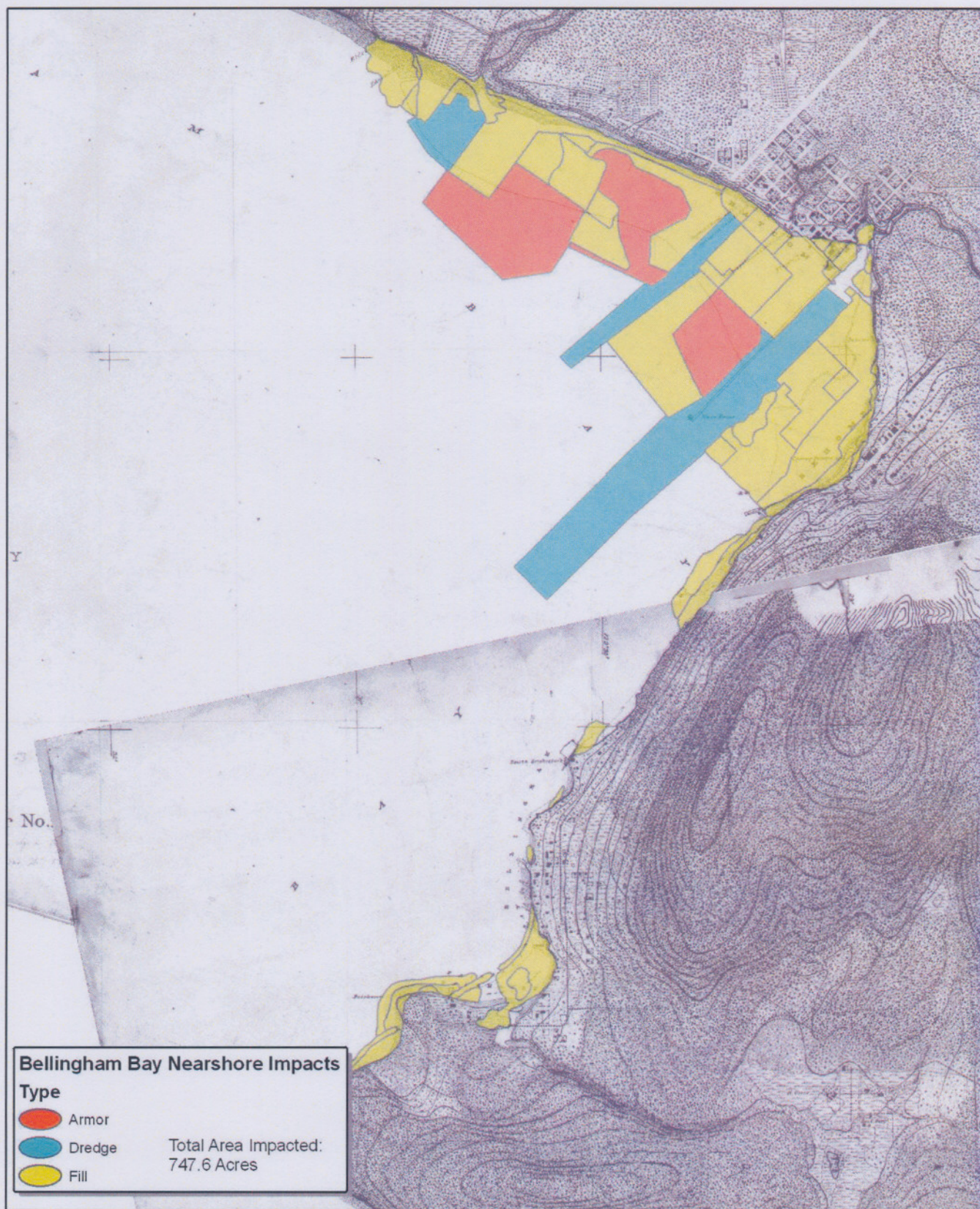


Figure 2. Bellingham Bay Nearshore Impacts